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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 Justin Edward Lewis,

7 Plaintiff,

8 v.

9 Caleb Baird,

10 Defendant.

Case No. 3:19-cv-05653-TLF

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

11 This matter is before the Court on defendant's motion for summary judgment. Dkt.
12 37. Plaintiff brought this action pursuant to 42 U.S.C. § 1983 and is proceeding *pro se*
13 and *in forma pauperis*. The parties have consented to the jurisdiction of Magistrate Judge
14 Theresa Fricke to conduct all proceedings in this case. Dkt. 23; see 28 U.S.C. § 636(c).
15 For the reasons set forth below, the Court grants defendant's motion and dismisses
16 plaintiff's complaint.

17 PROCEDURAL HISTORY

18 Plaintiff is currently an inmate at the Thurston County Jail; however, his claims
19 arise from events alleged to have taken place at the Kitsap County Jail (the "Jail"). Dkt. 5
20 at 5. Plaintiff filed his complaint on July 17, 2019, alleging claims against defendants
21 Caleb Baird (a Jail correctional officer), Chad Enright (Kitsap County Prosecutor) and
22 Penny Sapp (Jail Librarian). Dkt. 5. This Court declined to serve the complaint because
23 plaintiff's claims against defendants Enright and Sapp failed to state a claim upon which
24 relief could be granted. Dkt. 6. The Court provided plaintiff leave to amend his complaint
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1 to correct the deficiencies. *Id.* However, plaintiff failed to do so, and the Court
2 recommended dismissal of the defective claims. Dkt. 14. On February 10, 2020 the
3 District Court adopted the recommendation and dismissed plaintiff's claims against
4 defendants Enright and Sapp. Dkt. 16.

5 After the complaint was served upon the only remaining defendant, Caleb Baird,
6 and the parties consented to the jurisdiction of the undersigned, defendant Baird brought
7 a motion to dismiss. Dkt. 24. Plaintiff did not respond to the motion. The Court denied the
8 motion because, at the motion to dismiss stage, plaintiff's allegations must be accepted
9 as true—but the Court noted that this did not necessarily mean plaintiff would be
10 successful on the merits of his claims. Dkt. 30 at 5.

11 On March 5, 2021, defendant Baird filed his motion for summary judgment,
12 together with a *Rand* notice and the Declaration of John C. Purves. Dkts. 37, 38. Plaintiff
13 has not responded. Defendant reports that no discovery has taken place during the
14 pendency of this case. Dkt. 38 at 2.

15 FACTUAL BACKGROUND

16 The only claim remaining in plaintiff's complaint alleges that defendant Caleb
17 Baird, a correctional officer at the Kitsap County Jail, violated plaintiff's right to Equal
18 Protection in his investigation of an altercation between plaintiff and a fellow inmate. Dkt.
19 5 at 3–5; Dkt. 16.

20 Plaintiff has submitted no evidence (nor any response) to oppose summary
21 judgment. Plaintiff's complaint, which was signed under penalty of perjury, may be
22 considered as evidence—but only to the extent that it is based upon personal knowledge
23 and sets forth facts that would be admissible in evidence. *Jones v. Blanas*, 393 F.3d 918,
24 923 (9th Cir. 2004). The complaint alleges that plaintiff was in a fight with a white inmate
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1 who hit plaintiff in the face three times; plaintiff then hit him back. Dkt. 5 at 4–5. Plaintiff
2 claims the incident was recorded on DVR, but defendant Baird did not look at the camera
3 footage. *Id.* Plaintiff alleges the recording supported his version of events and that Baird
4 “only took one side of the story” in order to keep the white inmate out of trouble. *Id.*
5 Plaintiff asserts he was treated differently and given a harsher punishment than the
6 inmate with whom he fought, because of plaintiff’s “size and race.” *Id.*

7 Defendants have submitted as evidence defendant Baird’s incident report dated
8 May 24, 2019, which was submitted under penalty of perjury. Dkt. 38 at 2, 5–6. The
9 report, prepared on the same day as the incident at issue, describes Baird’s investigation
10 and the accounts of the witnesses he interviewed. Dkt. 38 at 5–6. Baird states that
11 inmate Paul Cichocki—showing signs of swelling and redness—reported an assault by
12 plaintiff after Cichocki had come to the defense of a third inmate. *Id.*

13 Defendant Baird took inmate Cichocki to an interview room, then escorted plaintiff
14 to a different area. *Id.* Baird reports that when asked for his version of events, plaintiff
15 reported that two people in the recreation yard came up behind him and one hit him, so
16 he defended himself. *Id.* Plaintiff asserted that the camera footage would support his
17 version of events. *Id.*

18 After returning to the interview room to speak with inmate Cichocki, arranging for a
19 nurse to provide medical attention and photographing Cichocki’s injuries, defendant Baird
20 then “retrieved the camera from the Sergeant’s office and reviewed the video.” *Id.* at 6.
21 Later that day, Baird interviewed a third inmate, Adam Gonzales, who reported that he
22 was the inmate Cichocki had defended and he had witnessed the altercation. *Id.* Inmate
23 Gonzales reported that plaintiff was the aggressor and had repeatedly punched and
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1 pushed inmate Cichocki after Cichocki had intervened on Gonzales' behalf. *Id.* Defendant
2 Baird's report concludes that plaintiff was charged with multiple infractions. *Id.*

3 DISCUSSION

4 **A. Legal Standard**

5 1. Summary Judgment

6 Summary judgment is supported if the materials in the record "show that there is
7 no genuine issue as to any material fact and that the movant is entitled to judgment as a
8 matter of law." Federal Rule of Civil Procedure (FRCP) 56 (a), (c). The moving party is
9 entitled to judgment as a matter of law when the nonmoving party fails to make a
10 sufficient showing on an essential element of a claim on which the nonmoving party has
11 the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party
12 bears the initial burden to demonstrate the absence of a genuine dispute of material fact
13 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine dispute concerning
14 a material fact is presented when there is sufficient evidence for a reasonable jury to
15 return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
16 252 (1986). In this context, materiality means the fact is one that is "relevant to an
17 element of a claim or defense and whose existence might affect the outcome of the suit";
18 thus, materiality is "determined by the substantive law governing the claim." *T.W. Elec.*
19 *Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

20 The non-moving party is required to show that genuine issues of material fact "can
21 be resolved only by a finder of fact *because they may reasonably be resolved in favor of*
22 *either party.*" *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*,
23 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250) (emphasis in
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1 original). Mere disagreement or bald assertion stating a genuine issue of material fact
2 exists does not preclude summary judgment. *Id.*

3 When the Court considers a motion for summary judgment, “[t]he evidence of the
4 non-movant is to be believed, and all justifiable inferences are to be drawn in [their]
5 favor.” *Anderson*, at 255. Yet the Court is not allowed to perform the jury’s function—the
6 Court may not weigh evidence, draw legitimate inferences from facts, or decide
7 credibility. *Id.* If the moving party meets the initial burden, an adverse party may not rest
8 upon the mere allegations or denials of his pleading; his or her response, by affidavits or
9 as otherwise provided in FRCP 56, must set forth specific facts showing there is a
10 genuine issue for trial. FRCP 56(c). The Court may not disregard evidence solely based
11 on its self-serving nature. *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir.
12 2015). But “the district court can disregard a self-serving declaration that states only
13 conclusions and not facts that would be admissible evidence.” *Id.*

14 In response to the motion for summary judgment, the nonmoving party is required
15 to present specific facts, and cannot rely on conclusory allegations. *Hansen v. U.S.*, 7
16 F.3d 137, 138 (9th Cir. 1993). The court must determine whether the specific facts that
17 are presented by the non-moving party, considered along with undisputed context and
18 background facts, would show that a rational or reasonable jury might return a verdict in
19 the non-moving party’s favor based on that evidence. *Emeldi v. University of Oregon*, 698
20 F.3d 715, 728-29 (9th Cir. 2012).

21 2. Section 1983

22 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (a) the conduct
23 complained of was committed by a person acting under color of state law, and (b) the
24 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
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1 laws of the United States. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
2 *other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate
3 avenue to remedy an alleged wrong only if both of these elements are present. See
4 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

5 **B. Plaintiff's Equal Protection Claim**

6 "The Equal Protection Clause of the Fourteenth Amendment commands that no
7 State shall 'deny to any person within its jurisdiction the equal protection of the laws,'
8 which is essentially a direction that all persons similarly situated should be treated alike."
9 *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v.*
10 *Doe*, 457 U.S. 202, 216 (1982)). "To state a § 1983 claim for violation of the Equal
11 Protection Clause, a plaintiff must show that he was treated in a manner inconsistent with
12 others similarly situated, and that the defendants acted with an intent or purpose to
13 discriminate against the plaintiff based upon membership in a protected class." *Thornton*
14 *v. City of St. Helens*, 425 F.3d 1158, 1166–67 (9th Cir. 2005) (internal quotations
15 omitted). To allege an equal protection violation based on race or other protected status,
16 plaintiff "must show that the defendant acted with an intent or purpose to discriminate
17 against him based upon his membership in a protected class. Intentional discrimination
18 means that a defendant acted at least in part *because* of a plaintiff's protected status."
19 *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) (citations and quotations
20 omitted).

21 Plaintiff does not allege his own race but alleges that Baird failed to review the
22 video of the altercation at issue and acted to protect the white participant and to punish
23 plaintiff more harshly because of plaintiff's "size and race." Dkt. 5 at 5. Plaintiff submits no
24 evidence of any intent or purpose to discriminate by defendant Baird. Plaintiff alleges only
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1 that he was punished more harshly than the white participant in the altercation, and
2 speculates that this was because Baird failed to review the video of the event and “only
3 took one side of the story.” *Id.*

4 Defendants have submitted evidence establishing that defendant Baird conducted
5 an investigation of the altercation. Dkt. 38 at 5–6. Baird spoke with the two combatants—
6 plaintiff and inmate Cichocki—to get their versions of events. *Id.* He also spoke with an
7 eyewitness to the altercation. *Id.* Finally, Baird has stated under penalty of perjury that he
8 reviewed the video footage of the fight. *Id.* Based upon all of this evidence, Baird
9 concluded that plaintiff should be infracted for his role in the altercation. *Id.*

10 Baird’s statement that he reviewed the video contradicts plaintiff’s allegation that
11 he did not, but the contradiction does not present a triable issue of fact sufficient to defeat
12 summary judgment. Baird’s statement was made under oath and is based upon his
13 personal knowledge of the acts he took. Plaintiff’s allegation, in contrast, provides no
14 foundation of personal knowledge and is wholly speculative; it is based solely on what
15 plaintiff believes Baird did or did not do. While this unsupported allegation was sufficient
16 at the pleading stage, where plaintiff’s allegations were taken as true, at the summary
17 judgment stage plaintiff must come forward with evidence to support his claim. *Celotex*,
18 477 U.S. at 322–23. *See also Nigro*, 784 F.3d at 497 (“The district court can disregard a
19 self-serving declaration that states only conclusions and not facts that would be
20 admissible evidence.”); *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir.
21 2003) (mere allegations are insufficient to oppose summary judgment, as are
22 unsupported conjecture and conclusory statements).

1 Plaintiff has failed to meet his burden to come forward with admissible evidence to
2 support his claim that Baird violated his right to equal protection. The Court therefore
3 GRANTS defendant Baird's motion for summary judgment and dismisses plaintiff's
4 complaint with prejudice.

5 IN FORMA PAUPERIS STATUS ON APPEAL

6 The Court must also decide whether plaintiff's *in forma pauperis* status should
7 continue in the event plaintiff appeals. See 28 U.S.C. §1915(a)(3) ("an appeal may not be
8 taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good
9 faith"). The Court must determine whether appeal is frivolous or malicious, or whether it
10 fails to state a claim on which relief may be granted. See 28 U.S.C. §1915(e)(2)(B)(i), (ii).

11 Here, as noted, plaintiff has failed to adduce any evidence to support his claim that
12 defendant Baird violated his right to equal protection. Accordingly, the Court concludes
13 that plaintiff's *in forma pauperis* status is revoked in the event of any appeal.

14 CONCLUSION

15 Based on the foregoing discussion, the Court GRANTS defendant's motion for
16 summary judgment; plaintiff's complaint is DISMISSED WITH PREJUDICE.

17 Dated this 11th day of May, 2021.

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20 Theresa L. Fricke
21 United States Magistrate Judge
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